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MIGRATORY AMERICAN DIVORCES—THEIR INTERNATIONAL STATUS — IS A CENTRAL REGISTRY PRACTICABLE?

In the course of several years' practice, both at the New York Bar and at the English Bar, my attention has been from time to time specially directed to this very important subject, from the fact that an increasing number of Americans are marrying English people or other foreigners year by year, and in many cases the transatlantic spouses have made not only one, but several prior essays in the matrimonial field. Frequently they have relied on the advice of some "divorce lawyer" (who so far as accurate knowledge of legal principles is concerned is often less reliable than the renowned "sea-lawyer") and have procured an alleged divorce in some far distant state, upon an alleged domicile, after an alleged service of process upon the defendant at his or her alleged residence.

They have been informed that so long as they had sworn at the time the decree was rendered that they had a "*bona-fide* intention" to become domiciled and had remained for the statutory period in that State, and so long as the defendant, after being duly served with process, had failed to appear or had appeared (in pursuance of a tacit understanding) and the proceedings were otherwise regular in accordance with the practice in the State in which the action was brought—they had a "perfectly good divorce, valid the world over," and could comfortably return to their accustomed pursuits in their home State.

These proceedings, I am bound to say, have brought discredit on American administration of justice all over the civilized world, and have brought untold misery in their train to innocent children and have been the means of diverting valuable estates into the hands of those who neither in justice nor morals should ever have become possessed of them.

I have in mind one especially painful case where a decree was procured more than twenty-five years ago which was undoubtedly void *ab initio*; one of the parties married again and had children who according to English law, will most certainly be declared illegitimate. In another case, (at present *sub judice*), the title to

large estates in Scotland is put in grave jeopardy through one of these fraudulent migratory divorces. It is of little use to argue that there will always be people who are ready to resort to any device in order to be separated and to marry another and in many cases the courts are powerless to prevent it because of the great difficulties arising from perjured evidence. But at any rate the Bar and the courts can do something by assiduously prosecuting lawyers who lend themselves to these fraudulent practises.

So far as the English courts are concerned, I know from experience, that they are disposed to administer justice with due consideration for the judicial systems and procedure of other countries, but they are entirely indisposed to countenance such frauds upon the court and the law as are frequently exhibited in these migratory divorces.

And I think it is of the utmost importance that public attention should be called as widely as possible to the international aspect of this matter, so that Americans who contemplate such divorces should clearly understand the grave risks that they run of having them declared invalid by any foreign court,—which always has the power to do so if there is no *bona fide* "domicile" (as understood internationally) in the jurisdiction where the decree was rendered.

So far as the English courts are concerned, I cannot too strongly emphasize the fact that, while they will of course recognize American divorces when duly procured and without fraud, they will decline to hold valid such divorces where there has been no *bona fide* domicile of the plaintiff in the State where the action was brought and he or she simply resided in such State for the period required by its laws, and very soon after returned to the real domicile.

The House of Lords in the comparatively recent case of Earl Russell (1901, Appeal Cases, p. 446), quickly decided that the Earl was guilty of bigamy, though he had procured a divorce from his first wife in Nevada (it being held by the Divorce Court in a previous action that the American court was without jurisdiction because of the want of a *bona fide* domicile of the Earl in Nevada), and they thereupon sentenced him to a term of imprisonment, though he had been advised by English and American counsel that this American divorce was valid. That was one of the most interesting cases of legal procedure imaginable. There was the House of Lords called upon to try a Peer, one of its own members, on a charge of bigamy. In accordance with the law of England, Peers have the right to call upon the entire Judiciary of England to assist

the House of Lords in the determination of such legal questions. The majority of the English judges were present on this occasion, and there were present also a large proportion of the members of the House of Lords. There was Earl Russell, a young man in the prime of life, who had had a most unfortunate experience with his wife in England. He took advice there and in the United States. He went to Nevada and procured a divorce. He then remarried and came to England, whereupon proceedings for divorce were taken against him by his first wife. The Divorce Court upon his default held the American divorce invalid, on the ground, as I have said, that he had not acquired a *bona fide* domicile in Nevada. He had simply gone there for the short time necessary to meet the requirements of the statutes of that State (which say that he must "reside" there), had procured his decree and had come away almost immediately. The Divorce Court said that this did not constitute a *bona fide* domicile; a *bona fide* domicile is the first requisite for jurisdiction in divorce; his divorce was void, and therefore he was guilty of bigamy and adultery. Notwithstanding that the Earl had procured the best advice he could under the circumstances, he had transgressed the statutes of the realm and therefore was indicted for bigamy. The proceedings being removed to the House of Lords, that body had the courage (for which I think all credit is due to them) to send one of their own members to gaol because he had broken the law, even though it was a mere technical breach of it brought about by mistaken advice as to a point of foreign law—it being admitted that he had no criminal intent.

Now I think that if the American courts would exercise the same firmness and courage in the administration of the law upon high personages there who attempt to debase the law by deliberately alleging a domicile which never existed, and perpetrating a fraud upon the court, the divorce colonies in the States would quickly dwindle in numbers and in quasi-aristocratic prestige. Many Americans are marrying British subjects, and it is now becoming an exceedingly serious and frequent question in England as to how far these American divorces shall be recognized. Such divorces are almost universally looked upon with suspicion; and it ought to be more generally understood than it is that the English courts can, and do, whenever American divorces come before them, take fresh evidence in the courts there to determine whether or not the plaintiff had in fact a *bona fide* domicile in the State where the divorce was granted. The mere recital in the American decree that the plaintiff was so domiciled is not enough. The English courts determine that question for themselves independently. The late case of

Haddock v. Haddock in the United States Supreme Court has reiterated this as the existing rule on this subject in American law.

I must confess to a fear that jurisdiction of the court in divorce cases, as a proposition of law, is not sufficiently studied by the average lawyer who undertakes divorce cases in the United States. I had my attention called in New York only a short time ago to the case of a lady who thought it was a very simple and easy matter to get a divorce. She told her friends that she was going West to get a divorce. She notified the telephone company in New York to take her name out of the telephone book, but took great care to warn her friends that she was at home and could be communicated with by telephone. She went out to the Western States and engaged rooms, returned to New York, and in due course of time, after a sufficient number of days of residence required by the statute had expired, she again went from New York to that State and came back with a divorce decree in her hand. All I can say is that if the validity of that divorce ever comes in question before the English courts, or before the American courts, it will be declared absolutely void. The *bona fides* of the domicile would be gone into, and it would certainly under those circumstances be deemed to be fraudulent and not *bona fide*. Obviously this litigant's counsel was ignorant or careless of the most elementary rules governing jurisdiction. This question of jurisdiction in divorce with reference to American decrees has quite recently come before the English Courts in *Armitage v. The Attorney General* [1906], Probate Reports, p. 135, and *Bater v. Bater*, *ibid.*, p. 209. In the Armitage case the wife, an English woman, had married a citizen of New York temporarily residing in England, who had not abandoned his New York domicile. The wife had (after her husband had deserted her) gone to South Dakota, abandoning her residence in England, and acquired a *bona fide* domicile in South Dakota. She there brought action against her husband for divorce; he appeared in the action, and filed an answer, together with a counter-claim or cross-petition, claiming divorce from his wife. The wife secured a divorce and then married a British subject in Denver, U. S. A., subsequently returned to England with him, and, at the time of action brought, had been domiciled in England for several years. In the meantime, her first husband, Gillig, had married again and described himself in the marriage register as "the divorced husband of Amy Gillig." After about five years Gillig petitioned to have his second marriage declared null, alleging that his first marriage was still subsisting. His first wife, now Mrs. Armitage, under a special statute (The Legitimacy Declaration Act,

1858, 21 & 22 Vict. ch. 93), petitioned the English Court for a declaration of the validity of her second marriage; Gillig was cited as a party; and the whole question of the validity of the South Dakota decree was examined in the English proceeding. That is a most useful statute in England. You will observe that in this case the first wife married again; the husband had married again, and he presented a petition to have it declared that his second marriage was null and void, because, as he alleged, the American divorce decree was invalid. His first wife could not be made a party to this nullity proceeding under the English practice. Thus it was found that the husband might have proceeded in the English court and have procured a declaration that his wife's American divorce was void, without her appearance at all in that action; but fortunately there is this statute in England which says that any natural born British subject, whose marriage or legitimacy is questioned, may petition the English court for a declaration that his marriage or the marriage of his parents or grandparents was valid, or that the petitioner was legitimate. This lady therefore petitioned the court in that case to have her marriage declared valid, and asked the court to order that the husband's nullity suit follow the trial of her petition. That was ordered, and on her petition the whole question of the validity of the wife's American divorce was gone into, and it was decided that she had, in fact, acquired a *bona fide* domicile, and had abandoned her English domicile (she had taken great care to establish herself in the United States and live there for some time and absolutely abandoned her English domicile), and the English court held that she had, in fact, acquired a *bona fide* domicile, and that her divorce was valid, and her second marriage was valid. This, therefore, settled the whole question, and the nullity proceeding of the husband was dismissed. This case illustrates the value of The Legitimacy Declaration Act, and is further important on this question of jurisdiction.

After very careful consideration, and after hearing the testimony of experts as to American Law, Sir Gorell Barnes, the President of the Probate and Divorce Division, decided that as Gillig, the husband, at the time of the South Dakota decree, still retained his New York domicile, and had himself filed an answer and counterclaim to the petition in South Dakota, and since by the law of New York such proceedings gave the South Dakota court complete jurisdiction over defendant Gillig (and therefore the courts of New York were bound to recognize the South Dakota decree as valid), the English court on grounds of international comity would recognize the South Dakota decree as valid in England. The President

said:—"The evidence in the present case shows that in the State of New York the decision of the court of South Dakota would be recognized as valid. The point then is, Are we in this country to recognize the validity of a divorce which is recognized as valid by the law of the domicile? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognized in the State of New York—the State of the domicile as having affected and determined it." The President also said that this point had not been distinctly determined by the English Courts in any other case. Thus that court decided that the South Dakota court had jurisdiction under the special facts to determine the marital status of a domiciled New Yorker and a former British subject.

The next case, *Bater v. Bater* [1906], Probate Reports, p. 209, was a still more complicated one. There the English court decided that the courts of New York had jurisdiction to divorce two British subjects, the husband having become domiciled in New York. The case was elaborately argued both in the court below and the court of Appeal. The facts were that the husband and wife separated in England, each claiming a cause of divorce against the other, and that both were at fault. This was a very curious case, because, the husband having left her in England, the wife, according to American law, would, if innocent, have the right to acquire a separate domicile. The husband came to America and took out his first papers preparatory to becoming a naturalized citizen, and settled in Brooklyn. The wife came to New York and resided there. She brought action for divorce there, and he failed to appear. She got her decree, married a British subject in New York, and returned to England with her second husband. They subsequently separated, and ten years afterwards the second husband brought an action in England to have his marriage declared null, on the ground that his wife's first husband was alive. She set up the New York decree of divorce in bar, and the whole question of the jurisdiction of the New York courts was thoroughly examined. The English court took this ground, that, while by English law the domicile of the wife is at the domicile of the husband (and though the fact was, by American law, he having given her cause for divorce, she could acquire a separate domicile if she chose), nevertheless she had the right to elect, if she saw fit, to adopt the domicile of her husband in New York as her domicile. He being at fault, the court said there is nothing in international law, and nothing on general principle which will forbid the wife in such a case saying that, while the American

rule is a valuable rule, it is a rule adopted for the benefit of the wife, and not to her detriment—that for the purpose of the action for divorce the wife had the right to go to the domicile of her husband and bring her action for divorce there. There was no case in the courts of New York exactly in point, and the President of the Probate and Divorce Division said he could see no reason why those principles should not be applied; and held the divorce valid and dismissed the nullity suit. The case went to the Court of Appeal, and there the decision was affirmed. The President said (p. 215):—"I feel that one is presented with a serious difficulty, because one has, so to speak, to place one's self in the same position as a judge in the State of New York would be in if this point was raised before him—in other words, to ascertain, through him, what is the rule he would apply in deciding this case." Referring to sections 1,756 and 1,768 of the Code of Civil Procedure, in discussing the question as to whether or not the wife, being separated from the husband, and in fact resident in another country up to within a short time of moving to New York, could bring her action for divorce there, he said there was nothing to prevent the New York court from saying (p. 216):—"If you have come to our court and your husband is domiciled here, we will, apart from our statutory difficulties, give you relief. Then, supposing that case is presented to the court in New York, the court would very naturally say, apart from being tied by the section, your husband is domiciled here: his home is here, and *prima facie* yours is here. You have come here to pursue him and obtain your remedy. Why should that remedy be withheld, because if you succeed you propose to return to your own country? I should have thought myself, as a matter of justice, expediency and convenience, it was very proper to allow a suit to be entertained in a foreign country in these circumstances, and I cannot help feeling that considerations of that character would weigh very considerably with a judge in the State of New York in deciding whether under such a term as the term 'resident' he was to exclude the petitioner from her right to maintain a suit. . . . I have come to the conclusion that this suit could have been maintained in the State of New York." The President held that, although the divorce was for a cause which would be insufficient for a decree in England, it would be held valid there because valid in New York (the place of the husband's domicile). He further said:—"If this country recognizes the right of a foreign tribunal to dissolve a marriage of two persons who were at the time domiciled in that foreign country, it must also recognize that their marriage may be dissolved according to the law of that foreign country even

though that law would dissolve a marriage for a lesser cause than would dissolve it in this country." Referring to fraudulent divorces he said that:—"Where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there and so had induced the court to grant a decree, the collusion or fraud in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicile."

Then affirming the decision of the President of the Probate and Divorce Division, the Court of Appeals said (Collins, M. R.) p. 225, as to a decree of divorce that it is a judgment that "is really indistinguishable from a judgment *in rem*. Some of the judges seem to have considered that for some reason it is not an absolute judgment *in rem*, but for all purposes it is on the same footing; that is to say, it is a judgment affecting the status of the parties. If it is a judgment *in rem* or stands on the same footing, as I think it undoubtedly does, can it be impeached in proceedings taken in this country by a person not a party to that judgment at all? . . . There is clear authority in our courts that that cannot be done." He further said (p. 232):—"The law now unquestionably stands in this position. The court of the existing *bona fide* domicile for the time being of the married pair has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country."

Then Lord Justice Romer, in taking up this question of the separate domicile of the wife, said very clearly (p. 233):—"Now the question arises, Was the wife dwelling in the State at the time she brought this action? Undoubtedly, according to the law of the State, the wife, in the circumstances which happened here, could have had a separate domicile from that of the husband, but I take it that the wife might have exercised her option, and that she was quite entitled, if she chose, to say that her domicile still remained the domicile of her husband as assumed by him, that is to say, domiciled in New York State, and I think that by going, as she did, to dwell in the State for the purpose of bringing the action for divorce, and then bringing that action, it must be taken that she had elected to make that domicile, at any rate for the purposes of the action, the domicile of her husband in New York State; and I cannot see that there is any good reason why the wife, if she chose so to elect her domicile, should not have elected to take that domicile for the purposes of the divorce if she could obtain it. Moreover, taking the expert evidence as a whole, I come to the same conclusion as that arrived at by the learned President, namely, that the wife had, according to the law of the State of New York, when

she brought this action, a residence there within the meaning of the word as used in the code governing the law in the State of New York. The result is that, dealing with the question of jurisdiction from the point of view of the law of the State of New York, the court had jurisdiction to entertain the action. Then how does the matter stand from the point of view of the English law? I have already stated that, on the facts the husband had changed his domicile, and had acquired a domicile in the State of New York. According to the English law until divorce the wife's domicile would be that of the husband or, at any rate, might be that of the husband if she chose, to the extent of her electing to regard the changed domicile of the husband as her domicile; and there is no reason, according to English law, why she should not be at liberty, if she chose, to go abroad to the State of New York, electing for the purposes of the divorce proceedings her domicile to be that of the husband and suing him there; and, according to English law, I take it that, at the time of action brought and divorce granted there, the domicile of both the husband and the wife was the domicile of the State in which the court in which the action was brought was situated, so that the court there had ample jurisdiction according to English law. Therefore, in whichever way the matter is regarded, it seems to me clear that the court granting this divorce had jurisdiction."

[Lord Justice Cozens Hardy said (p. 238) the wife "by her conduct manifested her election to treat herself as not having a separate domicile, but as following her husband's domicile in New York. This being so, it is now settled by authority which binds us that the court of the country in which the parties were domiciled—that is to say, New York—was the court having jurisdiction to decree a divorce, even though the divorce was granted for a ground which would not be sufficient in England" *Harvey v. Farnie*, 8 App. Cases 43; *Le Mesurier v. Le Mesurier* [1895] A. C. 517.]

Those are the two leading cases decided recently in England on this subject of jurisdiction in divorce, and I wish to summarize the points that have been decided by the English courts on the question, not including, of course, all the points on which the English courts would recognize these American migratory decrees. The English courts will recognize an American divorce, assuming the proceedings to be regularly conducted in accordance with the law of the State whose court grants the decree:—

(1) Where the parties are British subjects and the divorce is granted by the courts of the State in which the husband and wife are *bona fide* domiciled. The wife for the purpose of divorce may

elect to sue the husband at his domicile, even though by American law she might perhaps be entitled to acquire a separate legal domicile from his. *Bater v. Bater*.

(2) Where an English woman is married to an American citizen, and the divorce is granted by the courts of the State where the wife is domiciled, and the State where the husband is domiciled would recognize such divorce as valid. *Armitage v. The Attorney General*. [In that case the husband was domiciled in New York, and he appeared in his wife's South Dakota action and filed a cross-petition. The court then, of course, had jurisdiction over both parties and of the whole subject-matter, the wife (plaintiff) having a *bona fide* domicile there].

(3) Where the husband and wife are American citizens and the divorce is granted by the courts of the State where the plaintiff is domiciled and the defendant was served with process within the State where the action was brought or appeared in the action, even though for a cause not recognized in England as sufficient—this on principles of comity because such a divorce would be recognized as valid throughout the United States of America. *Armitage v. The Attorney General*; *Bater v. Bater*; *Haddock v. Haddock*, 201 U. S., Supreme Court Reports, p. 562.

So much for the substantive law as to jurisdiction, but the matter of procedure is only next in importance to it, and in this connection I desire to offer a few suggestions, which I think may help toward a practical solution of some serious difficulties.

In England we get such cases as this. A wife has been informed that her husband is getting a divorce against her in the United States by default. She does not know where to apply and asks where can we ascertain whether such action is being brought? It is absolutely impossible to find out unless you search the court records of every county in the United States. Then sometimes a man comes home to England and tells his wife: "You are divorced; there is the decree." The wife has heard nothing at all about it. Perhaps the husband will marry again and have children, and the question will arise as to the legitimacy of those children, and as to their right to inherit real estate, because by English law it is quite impossible to inherit English real property unless the person to inherit is legitimate according to the law of England. I suggest, therefore, the following as partial remedies for these difficulties:—

(1) That all matrimonial decrees (divorce, nullity, or separation) should be recorded, not only in the office of the clerk of the county where the judgment was rendered, but also in the office of the secretary of state of the State in which such county is situated;

and that it is also desirable that a copy of the complaint and the summons or writ should be filed in such secretary of state's office immediately after service. (2) All such matrimonial actions should be under the supervision of the attorney-general of the State and his assistants, who would be able to intervene in cases of fraud, in much the same way that the king's proctor in England may intervene, and of his own motion take steps to prevent the decree *nisi* being made final in the States where decrees *nisi* are granted. It would also be well if he had power to ascertain whether the necessary jurisdictional facts (e. g., *bona fide* domicile) existed before allowing the action to proceed. (3) The creation at Washington, or some central place, of a central registry for the recording of all such matrimonial decrees throughout the United States—to be done at the expense of the several States agreeing to use such registry.

As these three points are entirely on matters of procedure, it is competent for the several States each to pass a statute providing that the matrimonial decrees of that State shall not be deemed final and operative unless and until a copy of the complaint and summons or writ has been filed in the office of the secretary of state of that State, and likewise a copy of the decree, and unless the attorney-general has been properly cited. There can be no constitutional objection to such a course, for if by statute of the State in which the decrees were rendered it would not be deemed a valid final decree until recorded as above stated, no other State would under the Constitution be obliged to give it "full faith and credit" unless so recorded. Each State can regulate its own procedure, and no judgment is a valid final judgment unless entered in accordance with such procedure.

Any such central registry will, of course, not be easy of accomplishment, but none the less I think some constitutional method of creating it could be devised. We ought to get rid of the notion in the United States, that because of our constitutional system nothing can be done as is done in other countries. By a search in one office in London, all matrimonial decrees affecting forty millions of English people can be searched in a short time. The same is true of both Scotland and Ireland by a search in Edinburgh and Dublin. Why cannot there be (in time) one such office in the United States?

There is the further very serious question, which is rarely touched upon with reference to divorce decrees, viz., their effect upon titles to real estate and inheritance. As matters now stand in the United States, Mr. A. on selling his real estate may offer a deed purporting to be signed by Mrs. A., who may or may not be,

in law, his wife. If he has been divorced he will perhaps offer a divorce decree which may turn out to be regular, but he may at the same time conceal the fact that he was the defendant in prior divorce proceedings in which a decree was rendered, which for lack of jurisdiction is void, leaving him still married to his former spouse. At present there is no earthly practicable way of searching for such decrees throughout the United States. Again, Mr. B. dies leaving children who claim to inherit his estate. It may be that he was the defendant in some bogus divorce suit in a far away State, subsequently married again, and that these children are not entitled to inherit at all. Such registries would greatly facilitate search, and the fact that they existed would help to diminish the number of these secret divorces.

Of course States which make a bid for divorce business cannot be expected to spoil their business by agreeing to any such registries, but anything that can be done by legislation throughout the United States to lessen the number of places in which it is necessary to search is an immense gain, for it would facilitate the reopening of fraudulent divorce decrees by innocent persons before it is too late, would tend to settle titles to real estate, and to put the United States more on a par with the judicial systems of other countries.

I am aware, of course, that such central registry must be supported by voluntary action of the several States desiring to use it, and at their expense, and that it will not be a matter of federal regulation at all. There are also other difficulties and objections in the way, but I see none that are insuperable. Moreover, is it not time that there should also be a central registry for births, marriages, and deaths throughout the United States? At the present time it is practically an impossible task to ascertain the place of birth, marriage or death of any one whose descendants may be entitled to foreign real estate, unless his foreign relatives know where he settled or lived, which very frequently they do not. It is easier in States where these records are duplicated in the secretary of state's office; but in many of them there are no such duplicate records, and so those of each county or city must be searched. Such a registry in time would probably be partly if not wholly self-supporting, and the initial expense of it would be very small when divided amongst several States.

I think also, on the lines of my former suggestions, that there ought to be a statute passed in every State, (as I believe there is in some States), similar to the "Legitimacy Declaration Act" in England, by which when anyone's marriage or divorce is questioned,

he or she can petition the court for a determination of the validity or non-validity of the marriage or the divorce. As I pointed out in the case of *Armitage v. The Attorney-General*, the wife was able to stop the nullity proceeding of her first husband (to which she could not be made a party) and get a declaration saying that her American divorce was valid. I think if that suggestion were adopted it would avoid many great difficulties. The Attorney General should be cited to prevent fraud, as in England.

And finally, as it is the duty of all lawyers to do their part in ameliorating the condition of mankind in every rational way, I trust that both in the United States and in England they and all others who have the welfare of society at heart will direct public attention to this subject and endeavor to procure the passage of uniform divorce laws. The recent Divorce Congress in Washington and Philadelphia has done a great international service in this direction already, and will doubtless do still more. The judges can also be depended upon to do their part in bringing about some uniformity in judicial decisions on this subject. In time, therefore, I trust we shall be able to advise our clients that a divorce rendered in the United States will be recognized in England, and a divorce rendered in England of American citizens domiciled there will be recognized in the United States, and thus possibly some day there will be an end to the legislative and judicial chaos in which at present the divorce laws of the United States seem almost hopelessly involved.

J. Arthur Barratt.

London.